92-265

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

In re DANIEL VASQUEZ,
Warden of San Quentin
Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES) AND FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (RUDI M. BREWSTER, DISTRICT COURT JUDGE)

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QUESTION PRESENTED

Can a state condemned inmate, who is appealing the denial of a petition for writ of habeas corpus, return to the district court and reopen his "first" habeas petition in order to raise previously abandoned claims by way of a FRCP Rule 60(b) motion, thereby avoiding application of Rule 9(b) of habeas corpus rules and this Court's pronouncements on abuse of the writ?

PARTIES

Warden Daniel Vasquez and California Attorney General Daniel E. Lungren.

Bernard Hamilton, an inmate sentenced to death under the laws of California, is the subject of the underlying appeal.

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Petitioners pray that, pursuant to the All Writs Act, (section 1651, subdivision (a) of Title 28 of the United States Code), a Writ of Mandamus be issued in Hamilton v. Vasquez, Case Numbers 91-56251, 91-56252, and 91-56295, to compel the United States Court of Appeals for the Ninth Circuit (the Honorable Mary M.

Schroeder, Betty B. Fletcher, and Stephen S. Trott, Circuit Judges), to vacate an order permitting a remand to the district court during the pendency of the appeal from the denial of Hamilton's second and fifth petitions for habeas corpus and a writ of prohibition be issued in Hamilton v. Vasquez, Case Numbers CV-86-2102-B and 90-0291-B, to prevent the United States District Court for the Southern District of California (the Honorable Rudi M. Brewster, Judge), from conducting further proceedings pursuant to that remand.

The remand by the Ninth Circuit allows Hamilton to move the district court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for the purposes of revisiting his "first" petition for writ of habeas corpus in order to amend that petition to bring additional claims he declined to bring prior to an extensive evidentiary hearing in the district court,

and the issuance of a decision by the district court.[1/] Permitting a motion pursuant to Rule 60(b) during the pendency of Hamilton's appeal is in excess of the appellate court's jurisdiction and contrary to this Court's decisions on abuse of the writ and the prompt resolution of appeals from denials of habeas corpus in capital cases.

OPINIONS BELOW

Bernard Hamilton, the party to the underlying appeal, is an inmate sentenced to death under the laws of California. A federal stay of execution remains in effect. On August 23, 1991, the United States District Court denied

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1. An appeal is pending on the denial of Hamilton's "first" amended petition filed by his attorneys on October 22, 1990. Hamilton was to bring forward all of his known claims but basically incorporated the claims of his second and fifth pro per petitions. Hamilton has filed seven petitions in California state courts and five in federal courts.

Hamilton's second and fifth federal habeas corpus petitions in a 93 page memorandum opinion. (Appendix A.) An appeal is now pending before the Court of Appeals for the Ninth Circuit. Hamilton's attorneys have filed their opening brief, the time for Hamilton to file a separate opening brief in pro se has passed and petitioner filed a responding brief in the Ninth Circuit Court of Appeals on July 29, 1992.[2/]

During the pendency of the appeal, the Ninth Circuit issued a remand on July 7, 1992, to the district court to enable Hamilton to reopen habeas proceedings under Rule 60, subdivision (b) of the Federal Rules of Civil Procedure

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2. The pro se brief was due June 29, 1992. Petitioners received a 56 page pro se brief on July 31, 1992. A motion to file the belated brief is currently pending before the Ninth Circuit Court of Appeals.

and amend his "first" petition to bring additional claims. (See Appendix B.)

On July 17, 1992, petitioners filed a motion to recall the mandate and to reconsider the July 7, 1992 order granting Hamilton's motion for remand. On July 31, 1992, the Ninth Circuit denied that motion. The hearing on Hamilton's Rule 60 motion in the district court is now calendared for August 26, 1992.

JURISDICTION

Sections 1651, subdivision (a) and 2254 of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules give jurisdiction to this Court.

Jurisdiction in the district court over Hamilton's petition for writ of habeas corpus was pursuant to sections 2241, subdivision (a) and 2254 of Title 28 of the United States Code.

Jurisdiction in the Court of Appeals over an appeal from the denial of the petition for writ of habeas corpus is pursuant to section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE

A. Procedural Background

1. Direct Appeal

A jury convicted Hamilton of the murder of Eleanore Buchanan and he was sentenced to death on March 2, 1981. The California Supreme Court set aside the special circumstance finding and reversed the penalty of death after a majority of the court concluded that it was possible Hamilton did not intend to kill Mrs. Buchanan, as he may have removed her head and hands to prevent identification after an accidental killing during the course of kidnapping and robbing her. (People v. Hamilton, 41 Cal.3d 408, 221 Cal. Rptr. 902, 710 P.2d 981 (1985) ("Hamilton I").)

Following California's petition for writ of certiorari, this Court remanded the case to the California Supreme Court for reconsideration. (California v. Hamilton, 476 U.S. 1301, (1986).) On remand, Hamilton's conviction and sentence of death were affirmed by the California Supreme Court. (People v. Hamilton, 45 Cal.3d 351, 247 Cal.Rptr. 31 753 P.2d 1109 (1988) ("Hamilton II").)

On January 23, 1989, this Court denied Hamilton's petition for writ of certiorari. (Hamilton v. California, 488 U.S. 1047 (1989).)

2. State Court Collateral Review

To date, Hamilton has filed seven petitions for writ of habeas corpus in the California Supreme Court collaterally attacking his conviction and sentence of death. His first petition for writ of habeas corpus before the California Supreme Court was filed on

January 23, 1986. (In re Hamilton, Case No. 25095.) The petition was denied on March 13, 1986. A second petition for writ of habeas corpus was filed with the California Supreme Court on August 3, 1987. (In re Hamilton, Case No. S001870.) The second petition was denied in the opinion which decided Hamilton's direct appeal. (People v. Hamilton, supra, 45 Cal.3d 351.)

A third petition for writ of habeas corpus was filed with the California Supreme Court on May 27, 1988, and denied on July 14, 1988. (In re Hamilton, Case. No. S005806.) A fourth petition for writ of habeas corpus was filed with the California Supreme Court on June 1, 1988, and denied on July 14, 1988. (In re Hamilton, Case No. S005871.) A fifth petition for writ of habeas corpus was filed with the California Supreme Court on May 5, 1989, and denied on June

22, 1989. (In re Hamilton, Case No. S010092.) A sixth petition for writ of habeas corpus was filed with the California Supreme Court on February 27, 1990, and denied on March 15, 1990. (In re Hamilton, Case No. S014318.) Hamilton's seventh petition for writ of habeas corpus was denied by the California Supreme Court on February 19, 1992. (In re Hamilton, Case No. S024477.)

3. Federal Habeas Petitions

Hamilton has filed five federal habeas corpus petitions. The first was filed in the United States District Court for the Southern District of California (hereinafter "district court") on April 2, 1986. (Hamilton v. Vasquez, Case No. 86-0809-T.) Hamilton raised claims of ineffective assistance of counsel and denial of the right of self-representation. The petition was denied on the merits on September 4, 1986. On

September 24, 1987, the Ninth Circuit Court of Appeals vacated the judgment as premature based on Hamilton's failure to exhaust state court remedies. On September 30, 1987, the petition was dismissed without prejudice to refiling the petition following exhaustion. The issues in the petition were subsequently raised in a third petition filed in federal court.

A second petition was filed in the district court on October 9, 1986. (Hamilton v. Vasquez, Case No. 86-2101-B.) Hamilton claimed that shackling him during trial violated his constitutional rights. The petition was denied by the district court on the merits on November 19, 1987. Following an appeal to the Ninth Circuit, the case was remanded on August 23, 1989, with directions to the district court to review and consider the entire state court record before ruling on

the petition. (Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989).) The claims in the second petition were subsequently consolidated with Hamilton's fifth federal habeas petition.

A third petition which raised the same claims contained in Hamilton's first federal petition was filed in the district court on September 30, 1987. The petition was dismissed by the district court on August 31, 1988. (See Appendix A, at p. 4.) Hamilton's subsequent appeal to the Ninth Circuit was also dismissed on September 7, 1990, as moot in light of the Ninth Circuit ruling in Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989) which remanded Hamilton's second federal petition to the district court for further proceedings.

A fourth petition was filed on June 20, 1989, in the United States District Court for the Northern District

of California claiming ineffective assistance of counsel, denial of a fair trial, denial of due process, and a denial of access to the prison library. The petition was transferred to the United States District Court for the Southern District of California. The district court denied the petition on July 19, 1989, after finding that the grounds for relief, either were, or should have been, presented in previous petitions to the court.

A fifth petition was filed in the district court on March 7, 1990. (Hamilton v. Vasquez, Case No. 90-0291-B.) The fifth petition was consolidated with Hamilton's second federal petition (case number 86-2101-B) on June 8, 1990.

4. Hamilton's Waiver of Claims

Meanwhile, on October 17, 1989, prior to Hamilton filing his "first"

amended federal habeas petition,[3/] petitioners brought a motion in the district court to compel Hamilton to bring forward, or waive, all known claims. On March 8, 1990, pursuant to that motion, the district court ordered Hamilton to inform the court of any and all additional habeas claims of which he was aware.

On June 8, 1990, Hamilton filed a list of 38 potential habeas claims with the district court. Hamilton also conceded that many of those claims had never been raised in state court, and were unexhausted. On the same day, the district court provided Hamilton with additional counsel and also granted Hamilton until August 8, 1990, to return

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3. The district court has held that Hamilton's amended petition of October 22, 1990, (consolidated second and fifth federal petitions) constitutes his "first" petition for purposes of Rule 9(b) of the Rules Governing Section 2254 Proceedings regarding successive and abusive petitions.

to state court and exhaust remedies as to all unexhausted habeas claims. On August 2, 1990, at his request, Hamilton was granted additional time, until August 20, 1990, to exhaust state court remedies on any additional habeas claims.

Acting in his own behalf, on August 16, 1990, Hamilton filed a notice of abandonment of known habeas claims. (Appendix C.) On August 21, 1990, counsel for Hamilton informed the federal court that they had failed to file any identified and unexhausted claims in state court.

In lieu of deeming all unexhausted claims waived, the district court granted Hamilton yet another extension of time until October 22, 1990, to permit him to pursue unexhausted claims in state court. The district court also stated that in the event Hamilton filed claims in state court, the federal

proceedings would be stayed until such time as all the claims were exhausted in state court.

In a September 18, 1990, order, the district court explicitly notified Hamilton that "as of October 22, 1990, he would be deemed to have waived and abandoned any and all habeas corpus claims not yet filed in state court and any exhausted habeas claims not yet raised in his federal petition." (Appendix D.)

On October 18, 1990, Hamilton, acting in his own behalf, amended his fifth federal petition. (Hamilton v. Vasquez, Case Nos. 86-2101-B; 90-0291-B.) On October 22, 1990, Hamilton's counsel filed an amended and consolidated petition. Neither Hamilton nor his counsel pursued any additional claims in state court, despite the passage of nearly eight months, from February 26, 1990, through October 22, 1990, wherein he was

repeatedly ordered by the court to do so to avoid a waiver of claims.

On November 21, 1990, the district court found that Hamilton had intentionally waived and abandoned any and all habeas claims not yet filed in state court, and any exhausted claims not yet filed in federal court, in accordance with the district court's previous order of September 18, 1990. (Appendix. A., pp. 10-11.)

5. District Court Evidentiary Hearing

On April 23, 1991, a three-week evidentiary hearing commenced in district court before the Honorable Rudi M. Brewster, on issues of shackling and ineffective assistance of counsel; including defense investigation of Hamilton's whereabouts and defenses. Hamilton was transported from death row at San Quentin state prison in Northern California to the federal courthouse in

San Diego in early April, and was present in court throughout the proceeding.

At the conclusion of the evidentiary hearing, Hamilton moved to have the hearing held open to enable him to present additional claims. The district court denied the request, citing its previous orders requiring Hamilton to pursue unexhausted claims in state court and exhausted claims in federal court by October 22, 1990, and its order finding that Hamilton had in fact waived all such claims. (Appendix E, Evid. Hrg. X RT 189-191.)

Extensive written briefs were filed by the parties following the evidentiary hearing. On July 1, 1991, Hamilton requested a stay of the federal proceedings and funds for investigation of potentially meritorious claims. On August 20, 1991, the district court denied the request for a stay. (Appendix F.)

On August 23, 1991, the district court filed a 93 page opinion denying the petition for writ of habeas corpus. (Appendix A.) The district court denied Hamilton's in pro per motion for reconsideration on September 10, 1991. Hamilton's counsel's motion to alter or amend the judgment was denied on October 31, 1991. (Appendix G.)

On November 13, 1991, a certificate of probable cause was granted and a stay issued pending disposition of Hamilton's appeal of the denial of the petition for writ of habeas corpus before the Ninth Circuit Court of Appeals.

On March 17, 1992, Hamilton filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure seeking to reopen the district court proceedings and amend his habeas corpus petition to bring additional claims. On July 1, 1992, the district court issued an

order stating it would entertain the motion if the Ninth Circuit remanded the case for consideration of the motion. (Appendix H.) On July 27, 1992, after remand by the Ninth Circuit, the district court calendared the hearing on Hamilton's Rule 60(b) motion for August 26, 1992. (Appendix I.)

6. Current Status of Appeal Before the Ninth Circuit

Hamilton's appeal from the denial of his consolidated and amended federal habeas petition is currently pending before the Ninth Circuit Court of Appeals in case numbers 91-56251, 91-56252, and 91-56295. Hamilton's counsel have filed the opening brief in the Ninth Circuit and petitioner responded on July 29, 1992. Hamilton's counsel's reply brief is due on August 19, 1992, and Hamilton's in pro se reply brief is due on September 12, 1992.

Meanwhile, Hamilton filed a request for a remand of his case to the district court for purposes of having his Rule 60 (b) motion heard by the district court. On July 7, 1992, the Ninth Circuit issued an order remanding the matter to the district court for purposes of Hamilton's motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (See, Appendix B.) While the order provides that the parties are to continue briefing the appeal as previously ordered, the Ninth Circuit has not set any time limitations on the consideration of the motion in the district court. (Id.) Moreover, the Ninth Circuit order acknowledges that a full remand or further orders may become necessary depending upon events in the district court. (Id.)

On July 17, 1992, petitioners filed a motion to recall the mandate which issued immediately upon the issuance of

the order of remand and a petition for reconsideration of the remand order. The Ninth Circuit denied the motion and petition on July 31, 1992, (Appendix J) and this petition for writ of mandamus and prohibition follows.

B. Facts of the Crime.

On the evening of May 30, 1979, 24-year-old Eleanor Buchanan (the victim) had dinner with her husband and two infant sons, then left for school in their new van. They had purchased the van about six weeks earlier and her husband, a dental supply salesman, used it in his work during the day, carrying literature and samples. He told his wife there was very little gas in the van and not to add any because he was taking it to the dealer the next morning to replace the tank due to a leak.[4/] (RT 2079, 2077, 2099-2101, 2151.)

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4. All locks and windows worked and nothing was broken on the van when Buchanan turned it over to his wife.

Mrs. Buchanan left for school at 6:30 p.m. She was wearing tan Levi's, a striped beige and brown T-shirt, white knee socks, bra, panties and a simulated leather purse. (RT 2079, 2077, 2099-2101, 2151.)

Buchanan habitually locked the van, which had valuables in it including dental equipment from her husband's work. (RT 2146, 2150-2151, 2156, 2106, 2083.)

On May 30, 1979, she left her math class early after obtaining xeroxed class notes from fellow students because an optional quiz was offered and she had been absent for the birth of her three-week-old son. Students saw her walking towards the parking lot about 9:30

When respondent was arrested in it on June 8th, the arm rest of the driver's chair, the metal rod on the ceiling that holds the curtain suspended behind the driver and the wind wing on the passenger's side were all broken. (RT 2086, 2106-2107, 2573, 2577.)

p.m. (RT 2160, 2162, 2171-2173, 2181-2183.)

At about 1:52 a.m. on May 31, 1979, Hamilton called Donna Hatch in Terrell, Texas to say he had gotten a van and was leaving for Texas when he could get gas. (RT 2363-2364, 2444-2445.)

There was a gasoline shortage during this time and fuel was sold for limited hours. Between 4:30 a.m. and 10:15 a.m. on May 31, 1979, Hamilton purchased gas for the Buchanans' van on their Visa card at Roy's Service Station off Highway 8 in El Cajon, California. He signed the invoice, "Terry Buchanan". (RT 2206-2207, 2210-2211.)

About noon on the same day, Eleanor Buchanan's headless, handless body was found in the grass near a cul-de-sac off Pine Valley Road near San Diego. The cul-de-sac was 200 yards off Interstate 8. The body was in full rigor mortis with the

elbow in an upright position, completely off the ground, when a deputy sheriff arrived at the scene between 1:30 and 2:00 p.m. Two strings of twine were attached around Buchanan's ankles and there were dark blue pieces of lint sticking to her blood. The body was clothed in a bra, underpants and socks. The head and hands were never found. (RT 2278-2279, 2289-2290.)

During the autopsy, it was determined that a horizontal stab wound in the abdomen was inflicted before death. Three superficial wounds measuring up to five inches on the abdomen were inflicted after death. The pathologist could not determine cause of death because of the absence of the head, but ruled out natural causes. He could not say whether the hands were cut off while Eleanor Buchanan was alive, but suspected she was dead because there was not much hemorrhaging.

He could not say whether she was alive when the head was cut and sawed off. (RT 2337, 2333.) Judging from the rigor mortis, death occurred about 16 hours before the autopsy, about midnight on May 30, 1979. (RT 2340-2341.)

Meanwhile, Hamilton continued to drive down Interstate 8 from San Diego to Texas. (RT 2216, 2223, 2258-2259, 2264-2265.) He arrived at Donna Hatch's home in Terrell, Texas, on the evening of June 1, 1979. He was alone. The van was dirty, had a broken arm on the driver's chair, a broken mirror and a broken wind wing. (RT 2364-2368.)

Hamilton was on bail pending trial on a robbery charge. (See RT 3563.) He took Donna with him to get addresses for his defense in that case. She saw the Buchanans' credit cards in the van and Hamilton used them for food and gas. (RT 2369-2373, 2376.)

On June 3, 1979, Donna was in the van with Hamilton and her daughter and saw a highway patrolman. When Donna suddenly turned, while talking to her little girl, Hamilton told her not to make sudden moves because they could get shot. She asked why, but he gave no direct answer. Hamilton stopped at a pay phone to call his brother and his friend, Clifton. (RT 2376-2379.) Donna heard Hamilton tell his brother he had flown to Texas. (RT 2380.)

Cliff Harris and Hamilton knew each other all their lives and were good friends. (RT 2489.) Hamilton told Harris he drove to Texas in a blue El Dorado. Harris was watching TV as they spoke and saw a report that the headless body had been found. He told Hamilton. (RT 2490-2492; 3594, 3596.)

Hamilton had changed when he returned to the van after talking to Clifton Harris. (RT 2380.) Donna asked

what was wrong. Hamilton said he thought he killed a man. When they returned to her home, Hamilton said he would let the van sit a while to see if anyone paid attention to it and that he needed Texas license plates. He asked her to go to a car lot with him to get the plates, but she refused. (RT 2380-2381.)

The next day, Donna broke up with Hamilton. Hamilton said if she had changed her mind because he had lied about his wife being dead, then he would kill the ex-wife. (RT 2382.)

Hamilton called Donna on Wednesday, June 6, 1979, to discuss bringing her back to California to testify in his robbery case. (RT 2470-2471.) At one point, a friend of Donna's also got on the phone. Hamilton said, "I'm going to kill you and your friend, too. And you won't know when I'll be around because I don't have to be driving this van, I can

be in another vehicle." (RT 2474.) Donna never saw Hamilton after that phone call. (RT 2471-2472, 2382-2384, 2475.)

Hamilton continued to use the Buchanans' credit card. It was stipulated he charged a saw, screwdriver and set of wrenches at Babcock Auto Supply in Terrell, Texas, on June 6, 1979, (2518-2519), and a butcher knife and two hanks of twine at Moses five and ten cent store on June 7, 1979. (RT 2519-2520.)

At about 8:30 a.m. on June 8, 1979, Hamilton entered Stuckey's restaurant in Marietta, Oklahoma. He charged food on Buchanans' Visa, picked up part of his food order and ran out as the manager was calling for authorization on the purchase. The manager called law enforcement authorities and described Hamilton and the van. (RT 2746-2747, 2755-2757.)

That afternoon, Hamilton was stopped by Oklahoma officers and they ran a VIN number check. They learned the van belonged to a homicide victim. The officers arrested Hamilton on the local charges. (RT 2598-2599.)

On the way to jail, Hamilton passed a poster offering a $500.00 reward for David L. Wall, alias "Spider". (RT 2578, 2581.)

On June 9, 1979, San Diego police officers questioned Hamilton in Oklahoma after reading him his Miranda rights. Hamilton said he got the van from Fran, a white woman who had left her husband for "Spider", and that he knew "Spider" for six years.[5/] Fran and Spider

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5. Neither Hamilton's parents (RT 2048, 2078), nor friends (RT 2489-2734) ever heard of "Spider". "Fran" was Eleanor Buchanan's nickname. It was written on the school papers she was carrying on the night she disappeared and also in an unmailed birth announcement she had in her purse. (RT 2116-2117.)

were in Shreveport. They gave him the van and her charge cards to use for food and gasoline. (CT 2846-2848, 2854, 2862.)

Hamilton said he saw no blood in the van and the blood on his shoe was his own. (RT 2945-2946, 2904.) A criminalist testified at trial that the blood on Hamilton's shoe was type O, like Eleanor Buchanan's. (RT 2127.) Hamilton was type A. (RT 3112, 3110, 3114.) The criminalist further testified the blood on the shoe could not have come from the van's carpeting as it had no blue fibers in it. (RT 2127, 4017-4018.)

The police showed Hamilton a photograph of Eleanor Buchanan during questioning and asked if that were Fran. He said it looked like her but Fran was a little skinnier. Asked what Fran was wearing when she and Spider picked him up to leave San Diego, Hamilton said the only

time he saw her, she wore light jeans and a beige non-leather purse. (RT 2873-2875.)

En route to San Diego Hamilton was disturbed about the arrest for murder and kept saying it was not going to stick because all the police had was a body they could not identify and a run-away wife. (RT 2950.)

Shortly after Hamilton's return to San Diego, Terry Buchanan received a letter with Hamilton's return address in county jail. It said, "You are probably full of grief when you should be highly pissed-off . . ." because Fran was not dead but had left with Spider and was smoking Sherman sticks. Buchanan turned the letter over to the District Attorney's Office. (RT 2140-2145.)

Hamilton hinted to a local girlfriend in letters and during a jail visit that she should call Terry Buchanan

and the press, posing as Eleanor Buchanan, and tell them she was alive. (RT 3618-3621.)

On January 24, 1980, Hamilton was talking about his case to another prisoner. The prisoner said, "Who are you trying to convince, Hamilton, me or yourself?" Hamilton replied, "Well, I did it, but they'll never prove it." (RT 3023, 3030.) The prisoner reported the conversation to a guard. (RT 3032.)

While transporting Hamilton between the jail and courtroom for trial, a deputy sheriff was tightening Hamilton's security chains. Hamilton said, "You go ahead and have your fun, I'll have mine later." The guard responded, "I thought you already had your fun?" Hamilton replied, "Yeah, and I'll kill you and a lot more, too, and you may be first on my list." (RT 3327-3329.)

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Defense

Hamilton testified that he saw the Buchanans' van parked on the street with Eleanor's purse on the passenger seat just after midnight on May 31, 1979, and took it. (RT 3608, 3439.) He never saw the victim dead or alive. (RT 3438.)[6/] Hamilton believed she was killed by the man who found the body, Harry Piper. Hamilton said he must have dumped the body and then pretended to find it. (RT 2428.)

Rebuttal

Harry Piper had two crushed vertebrae and could not lift anything at the time he found the body. (RT 3981.) Furthermore, his car was parked over the drag mark, so the body was there when he

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6. However, he told police officers during questioning that the victim wore light colored jeans when she left with Spider (RT 2875) and she was in fact wearing tan levis when she left for school the night she disappeared. (RT 2100-2109.)

drove up. (Trial Exh. T and RT 3718, 3879.)

Penalty Phase

Hamilton had five prior felony convictions for forgery, burglary, and auto theft. (RT 4478-4479.)

On November 7, 1976, he robbed and beat Ruth Story, an elderly woman who was walking down a Linda Vista Street with a cane. (RT 4448-4452, 4552.) She was hospitalized and had reconstructive plastic surgery on her face. Five years later, she was still in pain and unable to chew even hamburger. (RT 4455, 4471-4472.) In a letter to Ms. Story dated November 17, 1978, Hamilton stated he did not know her personally. (RT 4527-4528, 4530.) Eleven days later, the district attorney received a letter from Hamilton claiming the victim used to pay him for sexual services from 1967-1969, when he was a minor. (RT 4541.)

In February, 1979, after spending the night in a motel with Rosie Blackman, whom Hamilton had seen frequently for three months, he punched and kicked her all over her body. She made no attempt to strike back. (RT 4429, 4434-4437.) A few weeks later, he came up to her at work as she was cleaning her taxi cab and repeatedly kicked her head and body. Her supervisor called the police. (RT 4435-4436.)

While in custody on October 8, 1980, Hamilton refused to go to court and assumed a fighting stance when deputies entered his cell. He had to be physically carried down the corridor. He yelled obscenities, threatened to fight the deputies and spit in the face of one of the officers. (RT 4400-4422.)

Penalty Defense

Hamilton, then 29 years old, had essentially a good home life as the sixth

of eight children. His father is a Baptist minister. (RT 4587.) He has two sons, then eight and nine year old living in Los Angeles with his ex-wife. (RT 4606-4608.) Relatives and family friends asked the jury to spare his life. (See also, People v. Hamilton, supra, 45 Cal.3d at 357-362, guilt phase facts; 364-366, penalty phase facts.)

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REASONS FOR GRANTING THE WRIT

REMANDING AN APPEAL TO EXPAND THE CLAIMS OF THE ORIGINAL WRIT PETITION WITH KNOWN-ABANDONED CLAIMS, DELAYS EXECUTION OF THE STATE'S VALID JUDGMENT OF DEATH AND PERMITS THE PIECEMEAL LITIGATION AND GAMESMANSHIP PRECLUDED BY RULE 9(B) OF THE HABEAS RULES AND MCCLESKEY V. ZANT

The writs of mandamus and prohibition should be issued because the Ninth Circuit's remand sanctions the use of Rule 60(b) of the Federal Rules of Civil Procedure by a condemned state inmate as vehicle for raising claims which were previously abandoned, thereby rendering a nullity this Court's recent jurisprudence on abuse of the writ. Petitioner has no other adequate remedy available to prevent litigating a matter which is in excess of the jurisdiction of the Court of Appeals and the district court.

On February 26, 1990, the district court granted petitioner's

October 17, 1989, motion to have Hamilton bring his known claims or abandon them. After many opportunities to return to the state court, petitioner abandoned his claims by not including them in his amended petition on October 22, 1990, proceeding to a three-week evidentiary hearing, decision and appeal. Yet, on July 7, 1992, the Ninth Circuit remanded the case to the district court so that Hamilton could present his known-abandoned claims by way of a FRCP Rule 60 motion.

Pursuant to section 1651(a) of Title 28 of the United States Code and United States Supreme Court Rule 20.1, petitioners Vasquez and Lungren respectfully request this Court to issue a Writ of Mandamus directing the United States Court of Appeals for the Ninth Circuit (Justices Schroeder, Fletcher and Trott), to vacate, in its entirety, the order of July 7, 1992, remanding Hamilton

v. Vasquez, to the district court and a writ of prohibition to the United States District Court (Judge Rudi M. Brewster) to cease proceedings on the Rule 60(b) motion.

A. The Ninth Circuit Remand For Purposes of the District Court Entertaining a Rule 60(b) Motion is Contrary to the Law Governing Habeas Corpus Procedure and in Excess of the Appellate Court's Jurisdiction

The success of Hamilton's Rule 60(b) motion would render meaningless the limitations in habeas corpus upon deliberate abuse of the system for purposes of delay. It is this very possibility which gives rise to the absolute principle of law that the Federal Rules of Civil Procedure do not, and cannot, apply to habeas corpus proceedings when they are inconsistent with habeas corpus rules. (Rule 11, Rules Governing

2254 Proceedings; Pitchess v. Davis, 421 U.S. 482, 489-490, (1975).)

This Court has held that Rule 60 of the Federal Rules of Civil Procedure is not applicable to habeas corpus when the effect of applying the rule would be to alter the statutory exhaustion requirement of section 2254 of Title 28 of the United States Code. (Pitchess v. Davis, supra, 421 U.S. 482.) As in Pitchess, Hamilton's motion for relief under Rule 60 would circumvent the wealth of legal authority designed to prevent attempts to abuse the writ and engage in piecemeal litigation. (See, e.g., McCleskey v. Zant, 499 U.S. ___, 113 L.Ed.2d 517, 111 S.Ct. 1454 (1991); Sawyer v. Whitley, ___ U.S. ___, 60 U.S.L.W. 4655, (6/22/92); Rule 9(b) Rules Governing 2254 Proceedings.)

Rule 9(b) of the Rules Governing Section 2254 Proceedings provides for the dismissal of subsequent petitions which

present new or different grounds, when the failure to assert those claims in prior petitions constitutes an abuse of the writ. When the government pleads abuse of the writ in a second or subsequent habeas petition, it is incumbent on the petitioner to show "cause" for failing to raise the claim and "prejudice" from the failure.

In the absence of a showing of "cause and prejudice", the petitioner must show a fundamental miscarriage of justice would result if the claim is not entertained. (McCleskey v. Zant, supra, 113 L.Ed.2d 517.) A miscarriage of justice requires the petitioner to show that a constitutional violation has probably caused the conviction of someone actually innocent of the crime or penalty. (Sawyer v. Whitley, supra, 60 U.S.L.W. 4655.)

When the district court denied Hamilton's motion to alter or amend the judgment and motion for new evidentiary hearing, the effect was to require Hamilton to file a subsequent petition for any additional relief sought. Hamilton now seeks to avoid the stringent law applicable to abusive and successive petitions by reopening habeas proceedings in the district court via Rule 60(b) even though an appeal is currently pending before the Ninth Circuit. By even entertaining that motion, the Ninth Circuit and district court sanction its use to expand the scope of a fully litigated federal petition. In so doing, the lower court creates the potential for the use of Rule 60 to avoid this Court's pronouncements concerning abuse of the writ.[7/] A prisoner would avoid the

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7. Use of Rule 60(b) to reopen district court proceedings without a showing of cause and prejudice, or

necessity of showing cause and prejudice, or miscarriage of justice simply by the use of Rule 60. The Ninth Circuit should not have permitted Hamilton an opportunity to circumvent these basic and absolute prerequisites to additional habeas claims being raised.

Since being sentenced to death over a decade ago, Bernard Hamilton has enjoyed protracted delay while the district court repeatedly ordered him to exhaust and bring known claims. Hamilton expressly and personally waived known claims not raised in the district court proceedings despite repeated opportunities to bring his claims.

On October 17, 1989, Hamilton was put on notice to bring forward all known claims by petitioner's motion.

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miscarriage of justice is being sanctioned by the Ninth Circuit in more than this case. (See, Carriger v. Lewis, ___ F.2d ___, Filed 7/28/92, 92 DAR 10417 at p. 10418 (9th Cir. 1992).)

(Neuschafer v. Whitley, 860 F.2d 1470, 1482 (9th Cir. 1988).) The district court granted the motion on March 16, 1990. On June 8, 1990, Hamilton's two habeas attorneys identified 38 issues and Hamilton was ordered to pursue all unexhausted claims in the state court, or those claims would be waived or abandoned. The district court's order expressly stated petitioner would "voluntarily, knowingly, and intelligently [have] waived and abandoned" all unexhausted claims not filed in state court and all exhausted claims not filed in federal court by October 22, 1990. All of the claims which are the ultimate basis for the Rule 60(b) motion were clearly known, or should have been known, to Hamilton before his amended petition was ultimately filed in federal court on October 22, 1990. Accordingly, the subject of Hamilton's 60(b) motion must be raised in a subsequent petition.

The Rule 60(b) motion is predicated on a claim that habeas counsel misinterpreted McCleskey v. Zant. The very basis of the motion serves to illustrate why the Rule 60(b) motion is a manipulative device. Mistake of habeas counsel cannot excuse the purposeful withholding of a known claim absent a showing of cause and prejudice by Hamilton. Hamilton has no right to counsel in his collateral attack on the state's judgment of conviction. (Coleman v. Thompson, 501 U.S. ___, 115 L.Ed.2d 640, 111 S.Ct. 2546 (1991); Pennsylvania v. Finley, 481 U.S. 551 (1987).) Accordingly, his counsel's purported mistake cannot serve as "cause" for his failure to bring his claims in a timely manner during proceedings on his "first" petition. Since it is obvious that Hamilton cannot clear the hump of cause and prejudice for a subsequent petition,

he attempts to manipulate inapplicable Federal Rules of Civil Procedure to achieve the desired delay.

If Hamilton is permitted to litigate his counsel's "mistake of fact" in the district court in the context of a Rule 60(b) motion, he is circumventing, and thereby eliminating, the requirement of cause and prejudice which applies in habeas corpus litigation. Moreover, the prompt resolution of Hamilton's appeal is being delayed to accommodate a claim of mistake by counsel which is patently absurd. Hamilton and his counsel were repeatedly warned that a failure to raise known claims would constitute a waiver of those claims. The issuance of McCleskey v. Zant merely served to confirm the propriety of the district court's repeated orders to exhaust and bring known claims or those claims would be waived.

Even if counsel actually misunderstood the holding in McCleskey, there is no explanation for counsel's failure to understand the repeated and clear orders of the district court.[8/] Indeed, the underpinnings of Hamilton's Rule 60(b) motion rests with the premise that habeas counsel believed it could ignore the repeated warnings and orders of the district court with impunity. Separate and apart from the holding in McCleskey, such disregard for the express orders of a court cannot be condoned or rewarded.

Permitting a Rule 60(b) motion to be entertained in the district court

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8. The purported mistake of habeas counsel in understanding the effect of McCleskey also suggests that McCleskey represents some unanticipated new development in the law. To the contrary, the Ninth Circuit has concluded that McCleskey is not a new rule of law subject solely to prospective application. McCleskey applies retroactively. (Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1991).)

has the effect of eliminating the applicable habeas rules and decisions of this Court pertaining to abuse of the writ. This Court should not permit the Ninth Circuit to allow an end run around the habeas corpus procedures which safeguard the states from endless litigation and the attendant absence of finality in their judgments.

B. The Remand for a Rule 60(b) Motion is Inconsistent With the Prompt Resolution of Hamilton's Appeal

This Court has explicitly stated a rule that whenever there is a stay in effect against a state enforcing a judgment of death, the federal courts have a "duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all the issues presented in the case." (In re Blodgett, 502 U.S. ___, 116 L.Ed.2d 669, 112 S.Ct.

674 (1992).) The remand by the Ninth Circuit is unrelated to the court's consideration of the issues presented in Hamilton's appeal. Indeed, the remand affords Hamilton an opportunity to improperly expand the issues in the appeal.

Resolution of Hamilton's appeal should not be delayed in order to permit him to pursue additional claims in the district court. (In re Blodgett, supra.) An appellate court's effort to await combined consideration of a continual stream of litigation from a condemned prisoner invariably results in prejudice to the state from protracted delay. (See, In re Blodgett, supra, 116 L.Ed.2d. at p. 674.)

This Court has stated with unmistakable clarity that adherence to its decision in McCleskey v. Zant and prompt enforcement by the district court and

courts of appeal of that decision, will obviate in many cases the basis for the Ninth Circuit's perceived need to accommodate multiple filings. (In re Blodgett, supra, 116 L.Ed.2d at p. 674.) Similarly, adherence to the decision in McCleskey by the Ninth Circuit would necessarily obviate the need to accommodate Hamilton's Rule 60(b) motion through a remand to the district court.

Although the remand from the Ninth Circuit was limited, and the appeal briefing has been ordered to proceed as scheduled, the delay attendant with the remand is undeniable. As the order of remand provides:

> ". . . The district court shall keep this court advised on an ongoing basis as to the hearing schedule it sets and any actions it takes on the motion."
>
> ". . . Depending upon the action taken by the district court in respect to the 60(b) motion, this court may make further orders that might take the form of a full remand, a further briefing order, or a

> combination. This court in this appeal will provide whatever opportunity is necessary to all parties to respond to the district court's actions on the 60(b) motion." (Appendix B, emphasis added.)

The remand necessarily entails briefing, motions and argument before the district court on the Rule 60(b) motion. It may entail the taking of evidence. Invariably, Hamilton's appeal will be delayed, despite completion of appellate briefing by the parties, due to the necessity of resolving the 60(b) motion in the district court. Indeed, no time constraints for consideration of the Rule 60(b) motion are contained in the Ninth Circuit's limited remand. The prompt resolution of Hamilton's appeal has now taken a back seat to the litigation of a motion which should not even be entertained inasmuch as it is totally inconsistent with Rule 11 of the Rules Governing 2254 Proceedings and this

Court's decisions in McCleskey and Blodgett.

The Ninth Circuit order permitting a Rule 60(b) motion in this matter violates both the letter and spirit of the law and is unmistakably contrary to both McCleskey and Blodgett.

Hamilton has had his proverbial day in court for well over a decade now. From the time of his arrest he has engaged in delay tactics. Indeed, the district court, after hearing witnesses during the evidentiary hearing, observed the following about Hamilton's pre-trial requests:

> "[T]he court is left with the inescapable conclusion that [Hamilton] was using every tactic available to him to create delay." (ER 171.)

Hamilton is still bent on delay. At this point, delay is through deliberate piecemeal litigation. The Ninth Circuit has cleared the path for needless delay.

Absent intervention by this Court, Hamilton's appeal will ping-pong between the district court and the appellate court, one issue at a time for the remainder of his natural life.

If this Court fails to act, the Ninth Circuit remand order will serve as a blueprint for the circumvention of this Court's express and repeated holdings condemning piecemeal litigation and undue delay in capital habeas litigation.

C. This Court is Empowered to Grant Petitioner Relief

This Court is empowered to issue writs of mandamus and prohibition to inferior courts pursuant to section 1651 of Title 28 of the United States Code, i.e. the All Writs Act. While Rule 20.1 of the United States Supreme Court Rules cautions that issuance of the writ is a matter of "sound discretion sparingly exercised," the writ may be issued to

secure justice in the absence of any other adequate remedy. (Maryland v. Soper (No. 1), 270 U.S. 9, 29, (1926).)

The authority of this Court to exercise mandamus extends to those cases that are within its appellate jurisdiction, despite the fact no appeal has yet been perfected. (Roche v. Evaporated Milk Assn., 319 U.S. 21, 25 (1943); F.T.C. v. Dean Foods Co., 384 U.S. 597, 603 (1966).) Mandamus may not be used as a substitute for an appeal. (Kerr v. United States Ct. for N.Dist. of Cal., 426 U.S. 394, 403 (1976).)

Mandamus is appropriate both to confine an inferior court to the lawful exercise of its prescribed jurisdiction and to compel the court to exercise its authority when it has a duty to do so. (Roche v. Evaporated Milk Assn., supra, 319 U.S. at 26; Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978).) The party

seeking mandamus must show that the right to issuance of the writ is "clear and indisputable." (Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953); Kerr v. United States District Court for N.Dist. of Cal., supra, 426 U.S. at 403.)

Petitioners have met these criteria for issuance of a writ of mandamus to the Ninth Circuit. The Ninth Circuits remand in the midst of an appeal to permit Hamilton to bring a motion with the effect of reopening proceedings before the district court and circumventing habeas corpus law governing abuse of the writ presents an exceptional circumstance and merits relief. This Court offers the only available forum to redress the abuse of discretion by the Ninth Circuit. (Supreme Court Rule 20.1.)

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D. The State Has No Other Adequate Remedy Available to Redress the Appellate Court's Jurisdictional Error

The State has a compelling interest in the finality of habeas corpus litigation. Permitting litigation in the district court during the pendency of Hamilton's appeal for the purpose of circumventing the applicable restrictions on abuse of the writ denies the State's rights which cannot be adequately redressed after the burden of litigating waived claims.

An extraordinary writ from this Court is the sole means of preventing a remand for a manipulative and inappropriate mid-appeal motion in the district court with the attendant waste of prosecutorial and judicial resources, and delay in a capital case. During the pendency of Hamilton's appeal, there is no

final decision which would permit petitioners to seek review by certiorari.

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CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Court grant a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit, (Circuit Judges Schroeder, Fletcher and Trott) and a writ of prohibition to the district court (Judge Rudi Brewster).

DATED this 7th day of August, 1992.

Respectfully submitted,

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October Term, 1992

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In re DANIEL VASQUEZ,
Warden of San Quentin
Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF MANDAMUS AND APPENDICES as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Hon. Rudi M. Brewster, Judge
United States District Court
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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 10th day of August 1992.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, August 10, 1992

Robin L. Dunham
ROBIN L. DUNHAM

Subscribed and sworn to before me
this 10th day of August, 1992.

Anne Marie Buford
Notary Public in and for said County and State

ANNE MARIE BUFORD

BEST AVAILABLE COPY